Shredded Any Good Documents Lately?

Del O'Roark

Mike -
It might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy. Let me know if you have any questions.
Nancy

> *E-mail sent by an Arthur Anderson house counsel to the A.A. office handling the Enron account three days after she allegedly first anticipated an SEC investigation of Enron audits and just before the massive destruction of Enron documents by A.A. personnel began.*

Introduction

If anything is certain other than death and taxes, it seems to be that lawyers in this country are always involved somehow in the great financial and political scandals – Watergate in the seventies, the Savings and Loan crisis in the eighties, Whitewater in the nineties, and now in this decade Enron-Arthur Anderson. This latest scandal involves one of the toughest professional responsibility issues – advising clients on document retention and destruction. Given the propensity of clients to blame their lawyers when things blow up, it has never been more important to know what you're doing when advising on this question.

Document destruction is the most complex ethics issue I have attempted to cover in these articles because the applicable professional responsibility rules are dependent on substantive law. My goal is to inform you on the ethics considerations when advising on document destruction and alert you to key substantive law issues. I emphasize that the analysis in this article is the beginning of research on the professional responsibility ramifications of document destruction – not the end.[i]

What Does "Unlawfully" Really Mean?

Kentucky Rule of Professional Conduct (RPC) 3.4(a)[ii] makes it a professional responsibility violation to unlawfully obstruct access to evidence, unlawfully destroy documents, or counsel or assist another person to do so. Consequently, to apply RPC 3.4(a) to a document destruction question it is first necessary to glean from state and federal substantive law when destruction is lawful, at what point destruction becomes unlawful, and what documents are required by law to be retained.

For example, in Kentucky KRS 524.100, Tampering With Physical Evidence, must be considered. This law makes document destruction a Class D felony if intentionally done when believing that an official proceeding is pending or may be instituted. In criminal cases destruction is unlawful even if evidence has not been subpoenaed or pro-

ceedings actually instituted as long as the perpetrator believes an official proceeding may be instituted sometime in the future.[iii] It is not clear whether this guideline applies to civil actions as well, but a prudent lawyer will assume so.

Additionally, lawyers in Kentucky advising clients in criminal cases on document destruction must be mindful of KRS 520.120, Hindering Prosecution or Apprehension in the First Degree, a Class D felony, and KRS 520.130, Hindering Prosecution or Apprehension in the Second Degree, a Class A misdemeanor. These laws penalize persons who render assistance to those being sought for prosecution in connection with the commission of a criminal offense. Careless advice on document destruction could expose a lawyer to an allegation of unlawfully assisting a client in avoiding prosecution.

The best example of a federal obstruction of justice law dealing with document destruction and retention is the recently passed Corporate and Criminal Fraud Accountability Act of 2002.[iv] It includes two new federal felonies. Knowingly destroying, altering, or fabricating records with the intent to impede, obstruct, or influence a federal investigation is now a felony with punishment up to 20 years confinement.[v] Failure of auditors of issuers of securities to retain key financial audit records and e-mail for five years carries a penalty of up to ten years in prison.[vi]

It is obvious that federal and state criminal statutes such as obstruction of justice laws apply to RPC 3.4(a). The controversial issue is what other laws apply. A strict interpretation of "unlawfully" invokes only criminal law. Various authorities, however, take a broader view and contend that noncriminal conduct may constitute unlawful destruction. This position is succinctly expressed in the *Modern Litigation and Professional Responsibility Handbook* as follows:

> Does the term *unlawful* mean more than "illegal"? Hazard and Hodes state that the term includes "noncriminal conduct that constitutes fraud, and the violation of a noncriminal legal obligation to produce a document or other material, and Gorelick, Marzen, and Solum state that the "better view … is that destruction of evidence is unethical … when the evidence is relevant to a reasonably foreseeable or pending legal proceeding, even if the destruction does not violate a criminal law." These authorities believe that it is unethical for a lawyer to destroy or alter materials when the lawyer knows that the materials are relevant to pending or contemplated litigation. (footnotes omitted)[vii]

Advocates of this position conclude that even if a lawyer does not believe that document destruction violates criminal law "[t]he prudent lawyer will consider carefully the negative ramifications of destruction – ranging from criminal liability to adverse inferences in tort – and almost always counsel against destruction."[viii]

The Kentucky Rules of Professional Conduct and *The Law Governing Lawyers*

The Kentucky RPCs on document destruction prohibit obstructing access to evidence and provide guidance on the scope of legal advice that may be given. What follows are the key RPC provisions with related comments.

RPC 3.4 Fairness To Opposing Party And Counsel

> A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
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> > Comment (2) Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

RPC 1.2 Scope of Representation

> ….
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> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
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> (e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall inform the client regarding the relevant limitations on the lawyer's conduct.
>
> > Comment (6) A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.
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> > Comment (7) When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by

> Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

RPC 2.1 Advisor

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.
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> > Comment (3): A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.
> >
> > Comment (5) In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

The American Law Institute's publication *The Law Governing Lawyers* is a recent secondary authority that is useful in analyzing RPCs. While it is not binding authority in Kentucky, courts nationwide frequently cite it. In the absence of a Kentucky ruling on an issue it is one of the best aids in resolving ethics questions. It treats the issue of document destruction essentially the same as the RPCs, but contains a more comprehensive analysis of key issues that are appropriate to review here.

The Law Governing Lawyers §118 (2), Falsifying or Destroying Evidence, provides that "A lawyer may not destroy or obstruct another party's access to documentary or other evidence when doing so would violate a court order or other legal requirements, or counsel or assist a client to do so." In the section's comments "evidence" is defined as "documentary or other physical material (including material stored in electronically retrievable form) that a reasonable lawyer would understand may be relevant to an official proceeding. It does not include exhibits and the like that an advocate or client constructs for illustrative purposes at a proceeding, even if the exhibit would be regarded as evi-

dence for some other purpose."[ix] The comments includes this helpful evaluation of document destruction and concealment issues:

> Unlawful destruction or concealment of documents or other evidence during or in anticipation of litigation may subvert fair and full exposition of the facts. On the other hand, it would be intolerable to require retention of all documents and other evidence against the possibility that an adversary in future litigation would wish to examine them. Accordingly, it is presumptively lawful to act pursuant to an established document retention-destruction program that conforms to existing law and is consistently followed, absent a supervening obligation such as a subpoena or other lawful demand for or order relating to the material. … If the client informs the lawyer that the client intends to destroy a document unlawfully or in violation of a court order, the lawyer must not advise or assist the client to do so ….
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> It may be difficult under applicable criminal law to define the point at which legitimate destruction becomes unlawful obstruction of justice. Under criminal law, a lawyer generally is subject to constraints no different from those imposed on others. Obstruction of justice and similar statutes generally apply only when an official proceeding is ongoing or imminent. For example, The American Law Institute Model Penal Code § 241.7 (1985) provides that the offense of tampering with or fabricating physical evidence occurs only if "an official proceeding or investigation is pending or about to be instituted...."
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> A lawyer may not destroy evidence or conceal or alter it when a discovery demand, subpoena, or court order has directed the lawyer or the lawyer's client to turn over the evidence. Difficult questions of interpretation can arise with respect to destruction of documents in anticipation of a subpoena or similar process that has not yet issued at the time of destruction. For example, a company manufacturing a product that may cause injuries in the future is not, in the absence of specific prohibition, prohibited from destroying all manufacturing records after a period of time; but difficult questions of interpretation of obstruction-of-justice statutes may arise concerning such practices as culling incriminating documents while leaving others in place. No general statement can accurately describe the legality of record destruction; statutes and decisions in the particular jurisdiction must be consulted. In many jurisdictions, there is no applicable precedent. Legality may turn on such factual questions as the state of mind of the client or a lawyer.[x]

Advising Clients

Clients most often seek advice about document destruction in two situations – when they want to establish a lawful records management program for their business and when they intend to destroy or have destroyed selected documents. The following paragraphs cover the professional responsibility considerations in rendering that advice.

Advising on the establishment of a records retention-destruction program: It is not unethical to advise clients they may destroy documents if it is lawful for the client to do so.[xi] It is generally accepted that it is unreasonable to require that all records be kept forever because someday they may be needed for litigation.[xii] Accordingly, if in the ordinary course of business destruction of documents occurs in good faith and consistent with law and customary business practice, no adverse inference should be drawn from their destruction or sanctions ordered.[xiii] This traditional treatment of routine paper records destruction also applies to electronic records destruction.[xiv]

Of course, lawyers need some knowledge of an adequate records retention-destruction program to competently advise on the legal considerations. A typical program:

- Covers all paper and electronic forms of record keeping the enterprise employs.
- Involves information technology personnel in the system design and implementation to assure that electronic documents can be retrieved or confirm that all copies of an electronic record are destroyed.
- Retains business records required for regular use.
- Retains all records required by law including those related to pending litigation.
- Provides upon notice of litigation a procedure for identifying records required for retention and protecting them from routine destruction.
- Retains records identified as related to foreseeable or potential litigation.
- Systematically collates retained records in a readily retrievable paper and electronic filing system format.
- Provides for the destruction of all other records including e-mail on a reasonable schedule consistent with good business practices.
- Documents the program's design, updates, implementation, and compliance enforcement.[xv]

A suggested approach in counseling a client requesting guidance on setting up a records retention-destruction program is to first ascertain whether the client has received any notification of forthcoming litigation. If so, depending on the nature of the notice, advise the client that he has either actual or constructive notice of pending litigation and should preserve all relevant evidence. Stress that "potential evidentiary value" is construed broadly and to err on the side of preserving records. Point out that, even if lawful, adverse inferences may be drawn from destruction of documents that at a later date become relevant to litigation. Therefore, even if not on notice of any kind of pending or potential litigation, advise the client to screen records for situations that could foreseeably develop into litigation and retain those records. Stress that retention of these records must not be selective so that only helpful records are retained while potentially harmful records are destroyed. After screening, records showing no risk of litigation and not required by law to be retained may be destroyed consistent with the to-be installed records retention-destruction program. The client should do this only after documenting that legal advice was obtained and only screened records were scheduled for routine destruction. Point out that random or *ad hoc* records destruction is inherently selective and suspicious when viewed retrospectively. Thus, it is essential to adhere to the approved retention-

destruction program without exception. Finally, suggest that the new program be given a legal review before implementation.[xvi]

Advising clients contemplating destruction of selected documents or who have destroyed selected documents.[xvii] The first step is to determine if destruction of the documents is unlawful. In Kentucky this determination often depends on whether the client is on notice or believes that an official proceeding is pending or may be instituted, but may be governed by other law as well. If destruction is lawful, the client may be so informed – but remember the conservative position that if there is any prospect of legal proceedings, retention of the documents should be recommended. Along with this advice consider suggesting to business clients that they implement a records retention-destruction program rather than perform *ad hoc* records destruction. Point out that, even if lawful, adverse inferences may be drawn from destruction of documents that at a later date become relevant to litigation. Cover the points made in the preceding paragraph on documenting that legal advice was obtained, that destroyed documents were screened and did not have litigation implications, and retention was not required by law.

Advising a client intending to unlawfully destroy or who has unlawfully destroyed records is a perilous situation for a lawyer. Consistent with the RPCs 1.2 and 2.1 a lawyer may discuss the law on document destruction in detail and the legal consequences of destruction, but must carefully avoid assisting illegal destruction. Under RPC 1.6, Confidentiality of Information, the lawyer usually may not disclose past, present, or contemplated unlawful destruction. An exception to this duty of confidentiality is RPC 3.3(a)(2), Candor Toward the Tribunal, which supersedes RPC 1.6 and requires disclosure of material facts to a court when disclosure is necessary to avoid a fraud being perpetrated upon it. Many authorities take the position that when RPC 3.3 is invoked a lawyer must take remedial measures with a client refusing to accept advice to retain records or refusing to disclose destruction.[xviii] These measures include remonstrating with the client to retain the records or, if destroyed, disclose destruction; advising that the lawyer will withdraw if the advice is ignored; and, if withdrawal is not feasible, advising that the lawyer has a duty to disclose the unlawful destruction in any ensuing civil or criminal proceeding.[xix] Document the file thoroughly!

Conclusion

The consequences of unlawful document destruction include criminal charges, contempt orders, case dismissal, evidence preclusion, instructions on adverse inferences or presumptions, in some states the new tort of intentional spoliation of evidence,[xx] and bar complaints. In view of the seriousness of these consequences, in this article I have followed the cautious view that "unlawfully" in RPC 3.4(a) includes both criminal and noncriminal law and that document destruction is unlawful if civil proceedings are reasonably foreseeable. As always, I leave the risk taking up to you. I believe clients are entitled to be accurately informed of the legality of the destruction of records they propose to destroy. Whether they should be advised to in fact destroy records is case dependent. Those advocating that lawyers should almost never advise destruction of records if there is any indication of potential litigation are probably correct. Lawful de-

struction of documents that later prove to be of potential evidentiary value is almost always discovered. Even though lawful, the adverse inferences that may be drawn from destruction can be fatal to a case. Records retention-destruction programs are well recognized as an acceptable method of managing large collections of documents. In my opinion advising on their establishment is ethical and appropriate. Remember that when a client wants to destroy selected documents for no particular reason, just wants to get rid of them – there is usually a reason. Find out what it is. Never, never destroy documents for a client. Finally, when working with document destruction issues, and with all due respect to client loyalty, never forget the old adage – if either you or the client is going to jail, make sure it's the client.

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[i] *See generally*, L. Hawse, *Spoliation of Evidence*, 54 Ky. Bench & Bar 13 (Summer 1990); *ABA/BNA Lawyers' Manual On Professional Conduct*, Fairness to Opposing Party -- Destroying Evidence at 61:705; J. Gorelick, S. Marzen, and L. Solum, *Destruction of Evidence* (1989); Wolfram, *Modern Legal Ethics* (1986), §12.3.5 Document Destruction and Other Suppression of Evidence. Other authority is cited below. I anticipate that the near future will bring a number of fresh articles on document destruction.

[ii] The Kentucky Rules of Professional Conduct are contained in SCR 3.130.

[iii] In *Burdell v. Commonwealth*, 990 S.W.2d 628 (Ky., 1999) the Kentucky Supreme Court referred to the Commentary to KRS 524.100 that "it is not necessary that the evidence be subpoenaed or the proceeding even be instituted. Rather, it is sufficient if the defendant believes an official proceeding may be instituted and he engages in the proscribed conduct with specific intent to impair the truth or availability of evidence…." Note that this is a criminal case. It seems probable that the Court will recognize a similar rule for tampering with physical evidence in civil cases, but this remains to be seen.

[iv] Sarbanes-Oxley Act of 2002 (H.R.3763), Title VIII – Corporate and Criminal Fraud Accountability, § 802, Criminal Penalties for Altering Documents.

[v] §1519.

[vi] §1520. Note that many federal and state laws and regulations require retention of documents for specific periods of time (*e.g.*, IRS, SEC, certain corporate matters). The Code of Federal Regulations is the place to start research. Thanks to the Internet there are numerous sources available to determine retention requirements. Begin with a "Google.com" search.

[vii] Fortune, Underwood, Imwinkelried, *Modern Litigation And Professional Responsibility Handbook* (1996), §5.13, p.236.

[viii] Fortune, Underwood, Imwinkelried, *Modern Litigation And Professional Responsibility Handbook* (1996), §5.13, p.238.

[ix] *Restatement of the Law Third – The Law Governing Lawyers*, (2000), Vol. 2, § 118, p. 216.

[x] *Restatement of the Law Third – The Law Governing Lawyers*, (2000), Vol. 2, § 118, p. 217.

[xi] RPC 3.4(a) makes only "unlawful" document destruction a professional responsibility violation.

[xii] *E.g.*, *Allstate Insurance Co. v. Sunbeam Corp*, 53 F.3d 804, 806-7 (7th Cir.1995).

[xiii] *See generally*, Huang & Muriel, *Spoliation of Evidence: Defining the Ethical Boundaries of Destroying Evidence*, 22 American Journal of Trial Advocacy 191 (1998/99). Sanctions include criminal penalties, imposition of discovery restrictions, instructions on adverse inferences from destruction, and evidence exclusion.

[xiv] RPC 3.4, Comment (2) … Paragraph (a) applies to evidentiary material generally, including computerized information. *See generally*, Michael M. Bowden, *Managing Electronic Data: You May Have To Produce It Someday*, 2002 Lawyers' Weekly USA 433, 6/24/2002.

[xv] *See*, Fedders & Guttenplan, *Document Retention and Destruction: Practical, Legal, and Ethical Considerations*, 56 Notre Dame Law Review 5,12 (1980); J. Gorelick, S. Marzen, and L. Solum, *Destruction of Evidence* (1989); and Michael M. Bowden, *Managing Electronic Data: You May Have To Produce It Someday*, 2002 Lawyers' Weekly USA 433, 6/24/2002.

[xvi] This paragraph is based on Huang & Muriel, *Spoliation of Evidence: Defining the Ethical Boundaries of Destroying Evidence*, 22 American Journal of Trial Advocacy 191, 202 (1998/99) and my general research.

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[xviii] See Wolfram, *Modern Legal Ethics* (1986), §12.3.5 Document Destruction and Other Suppression of Evidence; and *ABA/BNA Lawyers' Manual On Professional Conduct*, Fairness to Opposing Party -- Destroying Evidence at 61:705, 708.
[xix] RPC 3.3 Comment (11).
[xx] In *Monsanto Co. v. Reed*, 950 S.W.2d 811(Ky., 1997), the Kentucky Supreme Court rejected the tort of spoliation holding that adequate remedies were provided by evidentiary rules, missing evidence instructions, and civil penalties.